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March 2, 2005

VIA ELECTRONIC MAIL AND HAND-DELIVERY
The Honorable Charles L.A. Terreni
Executive Director
SC Public Service Commission
P.O. Drawer 11649
Columbia, SC 29211

RE: Petition to Establish Generic Docket to Consider Amendments
To Interconnection Agreements Resulting from Changes of Law
Docket No. 2004-316-C, Our File No. 528-10272

Dear Mr. Terreni:

Enclosed is the original and ten (10) copies of the **Petition for Emergency Relief** filed by NuVox Communications, Inc. ("NuVox"), Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston"), Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia", Xspedius Management Co. of Greenville, LLC ("Xspedius Greenville") and Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg") ("Xspedius"), KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V") (collectively, "Joint Petitioners") in the above-referenced docket.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope. By copy of this letter, I am serving all parties of record and enclose my certificate of service to that effect. If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc: John J. Heitmann Esquire
Heather T. Hendrickson, Esquire
all parties of record
Enclosures

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2004-316-C

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc. to Establish	)	**PETITION FOR**
Generic Docket to Consider Amendments to Interconnection	)	**EMERGENCY RELIEF**
Agreements Resulting from Changes of Law Docket	)	

COMES NOW, NuVox Communications, Inc. ("NuVox"), Xspedius Management Co. Switched Services, LLC ("Xspedius Switched"), Xspedius Management Co. of Charleston, LLC ("Xspedius Charleston"), Xspedius Management Co. of Columbia, LLC ("Xspedius Columbia", Xspedius Management Co. of Greenville, LLC ("Xspedius Greenville") and Xspedius Management Co. of Spartanburg, LLC ("Xspedius Spartanburg") ("Xspedius"), KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V") (collectively, "Joint Petitioners") pursuant to Commission Rules 103-835 and 836 and the statutory authority set out herein, requesting that the South Carolina Public Service Commission ("Commission") issue an Emergency Declaratory Ruling finding that BellSouth Telecommunications Inc. ("BellSouth") may not unilaterally amend or breach its existing interconnection agreements with the Joint Petitioners or the Abeyance Agreement entered into by and between BellSouth and Joint Petitioners (collectively, "the Parties").

Joint Petitioners bring the instant matter before the Commission in light of BellSouth's February 11, 2005 Carrier Notification and February 25, 2005 Revised Carrier Notification stating that certain provisions of the FCC's *Triennial Review Remand Order* ("*TRRO*") regarding new orders for de-listed UNEs ("new adds") are self-effectuating as of

March 11, 2005.[1] BellSouth's pronouncement is based on a fundamental misreading or the *TRRO*. As with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. It is not self-effectuating, as BellSouth claims. To the contrary, the FCC clearly stated that the *TRRO* and the new Final Rules issued therewith would be incorporated into interconnection agreements via the section 252 process, which requires negotiation by the Parties and arbitration by the Commission of issues which Parties are unable to resolve through negotiations.

Thus, as with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. NuVox, KMC and Xspedius have agreed with BellSouth that the *TRRO*, as well as the older *TRO* changes in law will be incorporated into their new arbitrated interconnection agreements. Accordingly, the Parties' new interconnection agreements will incorporate, *inter alia*, older *TRO* changes of law more-favorable-to-Joint Petitioners (such as commingling rights and clearer EEL eligibility criteria), as well as newer *TRRO* changes of law more-favorable-to-BellSouth (such as limited section 251 unbundling relief). The Parties' new South Carolina interconnection agreements certainly will not be in place by March 11, 2005.

BellSouth has taken an all or nothing approach to the *TRO* and past changes of law and it should not be permitted to pick-and-choose out of the *TRRO* the changes-of-law that are most favorable to it, while making NuVox and others wait-out arbitrations and/or the generic docket proceeding to get the *TRO* changes, such as commingling and clearer EEL eligibility criteria that are more favorable to them. In South Carolina, a generic proceeding has been

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[1] BellSouth Carrier Notification at 1. BellSouth filed its Carrier Notification with the Commission in Docket No. 2004-316-C on February 14, 2005 (BellSouth Notice of Submission , Attachment). A copy of the Carrier Notification is attached hereto as Exhibit 1. BellSouth revised its Carrier Notification on February 25, 2005. A copy of the Revised Carrier Notification is attached hereto as Exhibit 2.

established (2004-316-C), and the Joint Petitioners intend to re-file for arbitration next week. Until the Parties are through these proceedings (or otherwise reach negotiated resolution) they must abide by their existing interconnection agreements. That is what the interconnection agreements require. That is what the Parties' Abeyance Agreement requires. That also is what the *TRRO* requires. And that is what is fair.

The Commission must act now to prevent BellSouth from taking unilateral action on March 11, 2005 that would effectively breach and/or unilaterally amend Joint Petitioners' existing interconnection agreements. Importantly, the Commission's action must address all "new adds."[2] For facilities-based carriers like Joint Petitioners, high capacity loops and high capacity transport UNEs are essential and they are jeopardized by BellSouth's Carrier Notification.

Joint Petitioners will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the Parties' existing interconnection agreements and Abeyance Agreement by refusing to accept local service requests ("LSRs") for new DS1 and DS3 loops and transport that BellSouth claims is delisted by application of the Final Rules. Although used by Joint Petitioners to a lesser extent, the same is true for UNE-P. Furthermore, South Carolina consumers relying on Joint Petitioners' services will be harmed if BellSouth is permitted to implement its announced plan to breach and/or unilaterally modify interconnection agreements by refusing to accept LSRs for "new adds" as of March 11, 2005. South Carolina businesses and consumers could be left without ordered services while the Parties sort-out the

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[2] On March 1, 2005, the Georgia Commission voted to prevent BellSouth from taking action to unilaterally implement the *TRRO* with respect to all "new adds" as proposed in BellSouth's Carrier Notification. In voting to adopt the Georgia Commission Staff's recommendation, the Georgia Commission made clear that the Commission's decision applied to all carriers and all "new adds" (*i.e.*, it is not limited to MCI or UNE-P). A copy of the Georgia Commission's Staff Recommendation is attached hereto as Exhibit 3. A final written order from the Georgia Commission is not yet available.

morass that will be created by BellSouth's unilateral decision to reject certain UNE orders. The resulting morass also likely would lead to a flood of litigation and complaint dockets before the Commission.

Accordingly, Joint Petitioners seek expeditious consideration of this matter and an Order declaring *inter alia* that Joint Petitioners shall have full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such time that those agreements are replaced by new interconnection agreements resulting from the upcoming arbitration between the Parties.

PARTIES

1. NuVox is a Delaware corporation with its principal place of business at 2 Main Street, Greenville, SC 29601. NuVox holds a Certificate of Public Convenience and Necessity issued by the Commission that authorizes it to provide local exchange service in South Carolina. NuVox is a "telecommunications carrier" and "local exchange carrier" under the Communications Act of 1934, as amended ("the Act").

2. KMC III is a Delaware limited liability company and KMC V is a Delaware corporation. Both entities have their principal place of business at 1755 North Brown Road, Lawrenceville, Georgia 30043. KMC III and KMC V each hold a Certificate of Public Convenience and Necessity issued by the Commission that authorizes them to provide local exchange service in South Carolina. Each entity is a "telecommunications carrier" and "local exchange carrier" under the Act.

3. Xspedius is a Delaware limited liability company with its principal place of business at 5555 Winghaven Boulevard, O'Fallon, Missouri 63366. Xspedius holds various Certificates of Public Convenience and Necessity issued by the Commission that authorizes it to

provide local exchange service in South Carolina. Xspedius is a "telecommunications carrier" and "local exchange carrier" under the Act.

4. BellSouth is a Georgia corporation, having offices at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Act, and S.C. Code Ann. § 58-9-10.

JURISDICTION

5. BellSouth and Joint Petitioners are subject to the jurisdiction of the Commission respecting matters raised in this Petition.

6. The Commission has jurisdiction over the matters raised in this Petition pursuant to S.C. Code Ann. § 58-3-140 (vesting the Commission with "power and jurisdiction to supervise and regulate the rates and service of every public utility in this State"), S.C. Code Ann. § 58-3-170 (conferring jurisdiction upon the Commission to "supervise and fix all agreements, contracts, rates . . ." among telephone companies, S.C. Code Ann. § 58-9-1080 (authorizing the Commission to hear complaints involving telephone utilities) and S.C. Code Ann. § 58-9-280 (conferring jurisdiction on the Commission to provide for "unbundling of network elements")

7. The Commission also has jurisdiction under §251(d) (3) of the Act (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) respecting matters raised in this Petition.

STATEMENT OF FACTS

8. On February 11, 2004, Joint Petitioners filed jointly with this Commission a petition for arbitration of an interconnection agreement with BellSouth. The matter was assigned Docket No. 2004-42-C.

9. On March 2, 2004, the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC* ("*USTA II*")[3] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* ("*TRO*"), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[4] The D.C. Circuit initially stayed its *USTA II* mandate for 60 days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At that time, certain of the FCC's rules applicable to BellSouth's obligation to provide CLECs with UNEs were vacated.

10. On June 30, 2004, BellSouth and Joint Petitioners entered into an Abeyance Agreement which was later memorialized in a July 16, 2004 Joint Motion to Withdraw Petition for Arbitration ("Abeyance Agreement") with the expectation that the FCC would soon issue additional and new rules governing ILECs' obligations to provide access to UNEs.[5] Specifically, the Abeyance Agreement provided for an abatement of the Parties' ongoing arbitration in order to consider *inter alia* how the post-*USTA II* regulatory framework should be incorporated into the new agreements being arbitrated.[6] The Parties agreed therein to avoid negotiating/arbitrating change-of-law amendments to their existing interconnection agreements and agreed instead to continue to operate under their existing interconnection agreements until their arbitrated

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3 359 F.3d 554 (D.C. Cir. 2004).

4 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*").

5 The Abeyance Agreement was filed in the form of a Joint Motion in Docket No. 2004-42-C (filed July 16, 2004).

6 Abeyance Agreement at Paragraph 5.

successor agreements become effective.[7] Per the Abeyance Agreement, Joint Petitioners will be re-filing for arbitration and are currently planning to do so next week.

11. The Commission issued an order granting the Parties' Abeyance Agreement (*i.e.*, the Joint Motion) on October 6, 2004.

12. On August 20, 2004, the FCC released its *Interim Rules Order*, which held *inter alia* that ILECs shall continue to provide unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[8] The FCC required that those rates, terms and conditions remain in place until the earlier of the effective date of final unbundling rules, or six months after publication of the *Interim Rules Order* in the Federal Register.[9]

13. On February 4, 2005, the FCC released the *TRRO*, including its latest Final Unbundling Rules.[10] In the *TRRO*, the FCC found *inter alia* that requesting carriers are not impaired without access to local switching and dark fiber loops. The FCC also established conditions under which ILECs would be relieved of their obligation to provide pursuant to section 251(c)(3) unbundled access to DS1 and DS3 loops, as well as DS1, DS3 and dark fiber dedicated transport.

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7 *Id.*

8 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Further Notice of Proposed Rulemaking, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("*Interim Rules Order*").

9 *Id.* ¶ 21.

10 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005)("*Triennial Review Remand Order*") ("*TRRO*"). BellSouth already has sought to overturn this order. *United States Telecom Ass'n et. al. v. FCC*, Supplemental Petition for Writ of Mandamus, Nos. 00-1012 *et. al.* (D.C. Cir.), filed Feb. 14, 2005 (BellSouth, Qwest, SBC and Verizon were parties to the pleading).

14. In the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC held that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[11]

15. The *TRRO* will become an effective FCC order on March 11, 2005.[12]

16. On February 11 2005, BellSouth issued a Carrier Notification in which BellSouth alerted carriers to the issuance of the *TRRO* and made certain unfounded pronouncements regarding the effects of that order. Specifically, BellSouth claimed that "with regard to the issue of 'new adds'... the FCC provided that no 'new adds' would be allowed as of March 11, 2005, the effective date of the *TRRO*."[13] BellSouth further claimed that "[t]he FCC clearly intended the provisions of the *TRRO* related to 'new adds' to be self-effectuating," *i.e.*, "without the necessity of formal amendment to any existing interconnection agreements."[14] BellSouth stated that as of March 11, 2005 it would reject UNE-P orders and orders for high capacity loops and transport where it has been relieved of its obligation to provide such UNEs, except where such orders are certified in accordance with paragraph 234 of the *TRRO*.[15] BellSouth also announced that it would not accept new orders for dedicated transport "UNE entrance facilities" or "UNE dark fiber loops" under any circumstances.[16] On February 28, 2005, BellSouth issued a revised Carrier Notification indicating that it would refuse to provision copper loops capable of providing HDSL on March 11, 2004, as well.

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11 *Id.* ¶ 233.

12 *Id.* ¶ 235.

13 Carrier Notification at 1.

14 *Id.* at 2.

15 *Id.*

16 *Id.*

17. On February 14, 2005, BellSouth filed a submission in Docket No. 2004-316-C alleging that the "TRRO's provisions as to 'new adds' constitute a generic self-effectuating change for all interconnection agreements, and they are effective March 11, 2005, without the necessity of formal amendments to any existing interconnection agreements."[17]

DISCUSSION

A. The *TRRO* Is Not Self-Effectuating

18. Contrary to the positions asserted by BellSouth in its Carrier Notifications, the *TRRO* is not self-effectuating with regard to "new adds" or, for that matter, in any other respect (including any changes in rates of the availability of access to UNEs). In fact, in the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC plainly states that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[18] Section 252 of the Act requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation. This process is not "self effectuating."

19. This decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the *TRRO*.[19] With regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[20] The FCC also stated that "we expect incumbent LECs and requesting carriers to

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17 BellSouth Submission, at 1-2.

18 *TRRO* ¶ 233.

19 The FCC also recognized that, pursuant to section 252(a)(1), carriers are free to negotiate alternative arrangements that would result in standards governing their relationships that differ from the rules adopted in the *TRRO*. *See id.* ¶¶ 145, 198, 228.

20 *Id.* ¶ 196.

negotiate appropriate transition mechanisms for such facilities through the section 252 process."[21]

20. With regard to high capacity transport, the FCC also stated that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[22] And the FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[23]

21. With regard to UNE-P arrangements, the FCC also held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[24]

22. Thus, the FCC in no way indicated that it was unilaterally modifying state commission approved interconnection agreements or that the changes-of-law that would become effective on March 11, 2005 would automatically supplant provisions of existing interconnection agreements as of that date. The "different direction" BellSouth claims the FCC took with respect to "new adds" is not evident in the *TRRO*. Instead it is simply another diversion created by BellSouth.[25]

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21 *Id.* at note 519.

22 *Id.* ¶ 143.

23 *Id.* at note 399.

24 *Id.* ¶ 227.

25 BellSouth, in a pleading on this issue filed with the Georgia Commission, argues that the FCC can and did modify existing interconnection agreements in the manner alleged in its Carrier Notification. Neither aspect of the assertion is true. In support of its contention that the FCC can modify existing interconnection agreements, BellSouth cites the *Mobile-Sierra* doctrine. In so doing, however, BellSouth fails to reveal that the FCC has expressly found that "the *Mobile-Sierra* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements." *IDB Mobile Communications, Inc. v. COMSAT Corp.*, 16 FCC Rcd 11475 at note 50 (May 24, 2001). Even if that were not the case, there is simply no evidence that the FCC employed the *Mobile-Sierra* doctrine and made the requisite public interest findings for doing so in the *TRRO*. There is no express statement in the *TRRO* that says that the FCC intended to reform existing interconnection

23. Notably, the FCC's position in the *TRRO* also mirrors the position it took in the *TRO*. In the *TRO*, the FCC declined Bell Operating Company requests to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions, explaining that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252."[26]

24. BellSouth cannot escape the FCC's clear and unambiguous language requiring parties to amend their interconnection agreement pursuant to change of law processes. The Commission must not allow BellSouth to avail itself of its tortured interpretation of the *TRRO* with respect to "new adds." Accordingly, Joint Petitioners seek a declaration that the *TRRO*'s unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements and that they will not govern the Parties relationships until such time as – and only to the extent – that the agreements currently being arbitrated are modified to incorporate such unbundling decisions and transition plans.

B. The Abeyance Agreement Requires BellSouth to Continue to Provision UNEs Under the Terms of the Parties Existing Agreements, Until those Agreements Are Replaced with New Agreements

25. The terms of the Abeyance Agreement clearly require BellSouth to abide by the terms of the Parties' existing interconnection agreements until such agreements are replaced with new agreements currently being arbitrated. BellSouth and Joint Petitioners voluntarily agreed to continue to operate under the Parties' existing interconnection agreements until they are able to move into the arbitrated agreements that result from the upcoming arbitration docket.

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agreements. And there is no discussion of why negating certain terms of existing interconnection agreements is compelled by the public interest. Instead, the FCC stated quite plainly in paragraph 233 that the normal section 252 negotiation/arbitration process applies.

[26] *TRO* ¶ 701.

26. In the Abeyance Agreement, the Parties stated that they agreed to the abatement period so that they can "incorporate the negotiation of those issues precipitated by *USTA II*, as well as continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth."[27] To implement these shared objectives, BellSouth and the Parties agreed to "continue operating under their current Interconnection Agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement."[28]

27. In the Abeyance Agreement, BellSouth and the Joint Petitioners agreed to an orderly procedure for implementing whatever UNE rule changes ultimately resulted from *USTA II*. Since the Parties had all expended considerable resources in negotiating replacements to their expired interconnection agreements, and the process already was at the arbitration stage, it made no sense to anyone involved to waste time negotiating and arbitrating amendments to their soon-to-be-replaced expired interconnection agreements. Instead, all concerned agreed to identify the issues raised by *USTA II* and its "progeny" (i.e., the post-*USTA II* regulatory framework, including the FCC's Final Rules adopted in the *TRRO*[29]) and resolve them in the context of their arbitration proceeding to establish newly negotiated/arbitrated replacement interconnection agreements.

28. Nonetheless, by self-proclaimed fiat, BellSouth now seeks to walk away from its commitments in the Abeyance Agreement and make an end run around the Commission's

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27 Abeyance Agreement, at 2.

28 *Id.*, at 2.

29 The arbitration issues identified as a result of this process include Issue 23 (post federal transition period migration process), Issue 108 (*TRRO* / Final Rules), Issue 109 (*Interim Rules Order* intervening federal or state orders); Issue 110 (*Interim Rules Order* intervening court orders); Issue 111 (*Interim Rules Order* – transition plan / *TRRO* transition plan); Issue 112 (*Interim Rules Order* – frozen terms); Issue 113 (High Capacity Loop Unbundling Under 251/*TRRO*, 271, state law); Issue 114 (High Capacity Transport Unbundling Under 251/*TRRO*, 271, state law).

interconnection agreement arbitration process. By proclaiming that certain aspects of the *TRRO* are self-effectuating, and that BellSouth is entitled to unilaterally implement its disputed interpretation of those rule changes, BellSouth attempts to unilaterally amend the existing interconnection agreements that it previously agreed would not be changed, and renege on its agreement that the Parties would continue to operate under those agreements pending the outcome of the ongoing interconnection arbitration proceedings. As a simple matter of contract law and regulatory procedure, the Commission cannot allow BellSouth to simply abrogate the Abeyance Agreement and end run the arbitration process. Moreover, for BellSouth to ignore the commitments made to the Joint Petitioners in their Abeyance Agreement would constitute a breach of the duty to negotiate in "good faith" imposed on ILECs by Section 251(c)(1).

29. Joint Petitioners believe that BellSouth cannot implement the *TRRO* changes in law without modifying its interconnection agreements to reflect such rule changes. However, that is especially true with respect to the Joint Petitioners. BellSouth and the Joint Petitioners actually sat down and negotiated on that point immediately after *USTA II* became effective, agreed on the appropriate and orderly way to incorporate the post-*USTA II* rule changes into their new interconnection agreements, committed to continue operating under unchanged existing interconnection agreements UNE provisions until the newly negotiated/arbitrated agreements are finalized, and submitted this mutual agreement and understanding on how to implement *USTA II/TRRO* to the Commission for approval. BellSouth certainly cannot be permitted to usurp its commitments made to the Joint Petitioners in the Abeyance Agreement and to this Commission. All concerned have acted in reliance upon those commitments, and proceeded through the arbitration process on that basis.

CONCLUSION

30. BellSouth's recent Carrier Notices regarding the *TRRO* are baseless and thinly veiled attempts to breach and or unilaterally amend the Parties' existing interconnection agreements. Moreover, these notices signal an intent to breach the Abeyance Agreement and to usurp the arbitration about to be conducted by the Commission. Joint Petitioners will be irreparably harmed and South Carolina consumers will suffer if BellSouth is permitted to breach the Parties' existing interconnection agreements or the Abeyance Agreement. Such action would also contravene the FCC's express directive that the *TRRO* is to be effectuated via the section 252 process. As a matter of law, this Commission must ensure that Joint Petitioners have full and unfettered access to UNEs provided for in their existing interconnection agreements until such time as their agreements are superseded by the agreements to be arbitrated before the Commission.

31. Moreover, principles of equity and fairness dictate that BellSouth and Joint Petitioners should stand on equal footing and play by the same rules. Joint Petitioners have waited a long time to avail themselves of pro-CLEC changes of law such as commingling rules and clearer EEL eligibility criteria ushered in by the *TRO*. Indeed, both of those issues have been issues in the previous arbitration proceeding.[30] Even if they hadn't been arbitration issues, BellSouth has insisted on an all-or-nothing approach to implementing the changes-of-law ushered in by the *TRO*. BellSouth likewise must wait for the conclusion of the arbitration

[30] Issue 26 addresses whether BellSouth must abide by the FCC's commingling rules (BellSouth insists that it is entitled to an unwritten exception to the rules) and it remains unresolved. Issue 50 addressed whether the EEL eligibility criteria should be incorporated to the agreement using the term "customer" (as in the rule) or another term defined by BellSouth in a manner that could be construed to limit Joint Petitioners' access to UNEs. BellSouth recently agreed to abide by the rule and the issue was resolved using Joint Petitioner's proposed language.

process to avail itself of *TRRO* changes of law favorable to it. This foundation of fairness is encapsulated in the Parties' Abeyance Agreement.

PRAYER FOR RELIEF

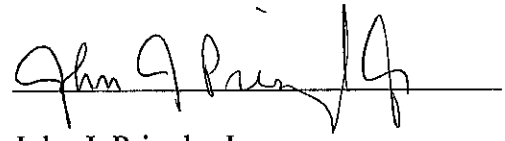
WHEREFORE, for the foregoing reasons, Joint Petitioners respectfully request that the Commission:

(1) declare that the transition provisions of the *TRRO* are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superseded by the interconnection agreements resulting from the upcoming arbitration docket;

(2) declare that the Abeyance Agreement requires BellSouth to continue to honor the rates, terms and condition of the Parties' existing interconnection agreements until such time as those Agreements are superseded by the agreements resulting from the upcoming arbitration docket;

(3) grant Joint Petitioners such other relief as the Commission deems just and proper.

Respectfully submitted,



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Dated: March 2, 2005

CERTIFICATE OF SERVICE

I, Jack Pringle, do hereby certify that I have, on this 22nd day of March, 2005, caused to be served upon the following individuals, by electronic mail and first class U.S. mail, postage prepaid, a copy of the foregoing:

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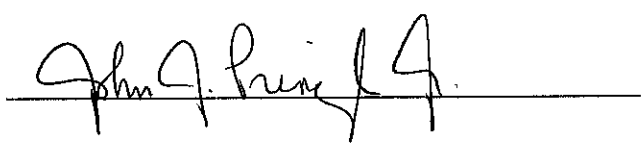

Exhibit 1

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 11, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

Exhibit 2

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules (Originally posted on February 11, 2005)

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former Unbundled Network Elements ("UNE") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on Incumbent Local Exchange Carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing Interconnection Agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
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[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing Interconnection Agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing Interconnection Agreements. Therefore, while BellSouth will not breach its Interconnection Agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all Interconnection Agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or Unbundled Network Element-Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops, **including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services**, in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005, BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1, **HDSL** and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (3-6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing Interconnection Agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any

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[10] TRRO ¶235
[11] TRRO ¶199 Also see ¶¶ 198

orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGNAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

Exhibit 3

R-1. DOCKET NO. 19341-U: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders. (Leon Bowles)

Summary of Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

2. Issues related to a possible true-up mechanism should be decided at a later time.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

Background

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth Telecommunications, Inc. filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth Telecommunications, Inc. ("BellSouth"). The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI

states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the Triennial Review Remand Order ("TRRO") it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . MCIm or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission, the D.C. Circuit Court of Appeals held that it is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using

unbundled access to local circuit switching." (BellSouth Response, p. 4, quoting TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth cites to no language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the

transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Staff's recommendation is consistent with the Commission's decision in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket. The Staff believes that it would be consistent to apply that reasoning in this instance as well.

2. Issues related to a possible true-up mechanism should be decided at a later time.

Staff recommends that the Commission defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter is being brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. Prior to voting on this issue, it may be of assistance for the Commission to confirm that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved. Staff intends to bring this issue back before the Commission in a timely manner.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Staff recommends that the Commission decide those issues in the regular course of this docket.